SUPREME COURT, U. S.
FEB 6 1975
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IN THE

Supreme Court of the United States

OCTOBER TERM, ____

No. 74-975

ROBERT LOUIS RICHARDSON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF JURISDICTION

On 5 November 1974, the United States Court of Appeals for the Ninth Circuit confirmed the conviction of Robert Louis Richardson for violation of 21 U.S.C. 841 (a) (1).

This Court has jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari under 28 U.S.C. §2154 (1).

QUESTION PRESENTED FOR REVIEW

Did the District Court err when it entered an order enlarging the record on appeal?

Table of Authorities Involved

Rule 10(e) of the Federal Rules of Procedure.

STATEMENT OF THE CASE

This case was begun by the return of an indictment by the Federal Grand Jury sitting at Tucson, Arizona charging the petitioner Robert Louis Richardson, and others in count one of the indictment with violation of 21 U.S.C. §846 with knowingly and intentionally conspiring to possess a quantity of marijuana with the intent to distribute that marijuana within the United States of America. Count Two charged the petitioner Robert Louis Richardson with knowingly and intentionally possessing with intent to distribute a quantity of marijuana in violation of 21 U.S.C. §841 (1).

Petitioner was arraigned on the 13th day of December, 1973, while represented by retained counsel and entered a plea of not guilty as to both counts.

On 16 January 1974, petitioner filed a Motion to Suppress Evidence. On 1 February 1974, the Government filed a response to petitioner's Motion to Suppress. On 4 February 1974, the Court, the Honorable Thomas F. Murphy presiding, heard the Motion to Suppress and the matter was taken under

advisement. On 5 February 1974, the Motion to Suppress was denied. On 14 February 1974, petitioner filed a Motion for Reconsideration on the ruling of the Motion to Suppress. On 14 February 1974, the Court upheld its previous ruling. On 19 February 1974, a trial was held before the Honorable Thomas F. Murphy and the matter was taken under advisement by the Court. On 20 February 1974, the Court entered a verdict of guilty as charged in Count Two of the indictment and further ordered that petitioner's objections to admissions were overruled. On 2 April 1974, petitioner was committed to the custody of the Attorney General for a period of four years pursuant to Title 18, United States Code, Section 4208(A) (2). On the 5th day of April, 1974, petitioner posted a bail bond on appeal in the amount of $10,000.00. On the 5th day of April, 1974, petitioner filed a Notice of Appeal.

On 22 July 1974, after all briefs had been filed in the Ninth Circuit Court of Appeals, the United States Attorney filed a Motion for Enlargement of Record on Appeal requesting that a complaint and arrest warrant for the person of Robert Louis Richardson be admitted so as to be considered in the record on appeal. That motion was granted by the District Court Judge on August 2, 1974.

After submission of all briefs and oral argument, the United States Court of Appeals, Ninth Circuit, rendered its opinion of 4 November, 1974 affirming petitioner's conviction. A petition for review was filed on November 12, 1974 and thereafter, an order was entered on the 4th day of December, 1974, affirming the opinion.

ARGUMENT

The transcript of testimony at the trial will be referred to herein as RT followed by the appropriate page and line numbers. Robert Louis Richardson will be referred to as petitioner.

On 22 July 1974, after all briefs had been filed, the United States Attorney filed a Motion for Enlargement of Record on Appeal requesting that a complaint and an arrest warrant for the person of Robert Louis Richardson be admitted so as to be considered in the record on appeal. In the affidavit of the U .ited States Attorney attached to the Motion, the United States Attorney stated that the arrest warrant was inadvertently, by error or accident, omitted from the record on appeal. A perusal of the transcripts of the Motion to Suppress hearing which was held on 4 February 1974, as well as the trial transcript of 19 February 1974, clearly show that the United States Government was not relying on the warrant of arrest to prove their case. At the hearing on the Motion to Suppress (RT P. 16, L. 8-9) Agent Herb Reay testified as follows:

"Q. You had an arrest warrant?

A. No, I'm sorry, we did not."

During the course of the trial on 19 February 1974, Agent Reay testified on page 7 of the transcript that when they arrived at Mr. Richardson's house:

> "We exited the vehicle and went up to the front door of the residence. Special Agent Day was with me and had in his possession a search warrant for the residence. He knocked on the door to announce that we were Federal Officers with a search warrant."

On page 13 of the trial transcript at line 12, Agent Reay testified that after performing the search of the premises:

> "We executed the return of the search warrant, left a copy in the residence and transported Mr. Richardson back to our office for further processing."

It is obvious from reading the above that the Government was not relying on its warrant of arrest in order to sustain the arrest and/or search. Rule 10(e) of the Federal Rules of Procedure states that the record can be modified for the following reasons:

A. If there is a disagreement as to what transpired in Court. It is submitted that there is no disagreement as to what transpired in Court.

B. If anything material to either party is omitted by error or accident or is misstated therein, the record can be corrected or modified. It is apparent from reading the transcripts of what transpired during the course of the motion to suppress and the trial that there was no reliance by the Government on the warrant of arrest.

To allow the Government to include the arrest warrant was grossly unfair to the petitioner. The petitioner in this case had filed a motion to suppress based on the fact that he was arrested without an arrest warrant and that this arrest took place prior to a search of the premises by the Government agents. The petitioner in this case waived a jury trial knowing that in doing so he would most assuredly be found guilty by the trial judge but he chose to do so relying on the opinion of his counsel that in doing so he preserved his right to appeal the denial of the motion to suppress and, in fact, the petitioner has filed a timely notice of

appeal and has proceeded ahead with the appeal by filing an opening brief and a reply brief. The essence of petitioner's case on appeal is the unlawful arrest by the agents before they executed the search warrant. If the Government is to now be allowed to insert into the record the warrant of arrest, the petitioner should then be granted the right to have all proceedings subsequent to the arraignment be vacated and the matter proceed forward from the arraignment. It is submitted that otherwise the petitioner has been put to much time and great expense in defending this case when the Government apparently had the arrest warrant in its records the entire time, but chose at no point to introduce the warrant of arrest. To now allow the Government to introduce into the record the warrant of arrest would be most unfair to the petitioner.

In addition to the foregoing, petitioner submits this Court should not consider the arrest warrant because the warrant is insufficient on its face. The warrant is insufficient for the reason that there is no affidavit attached thereto which sets forth any facts sufficient to establish probable cause. It is axiomatic that the question as to the arrest warrant's validity ordinarily turns upon whether the affidavit underlying it sets forth facts sufficient to establish probable cause. *U. S. v. Morris*, 277 F.2d 657, 5th Cir. 1973. An arrest warrant must set forth facts or information affording a sufficient basis for finding of probable cause to believe that a federal offense had been committed by the defendant. *Hollingsworth v. U. S.*, 321 F.2d 342, 10th Cir. 1963. Furthermore, it is necessary to have a certain quantum of probable cause for the issuance of an arrest warrant. This exists where the circumstances within the

affiant's knowledge and that which he has reasonably trustworthy information that is sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *U. S. v. Cooperstein*, 221 F. Supp. 522.

Petitioner respectfully submits that in the instant case there is nothing in the complaint and/or warrant which indicates that the requisite probable cause was present for the issuance of the warrant.

Finally, it is the position of the petitioner that if this Court agrees that the record was properly enlarged, this matter should be remanded back to the District Court so that the petitioner may have an opportunity to attack the warrant of arrest. Petitioner has not had this opportunity up until this point because the arrest warrant was never in the case until the appellate stage of the proceedings. The Governemnt should be precluded from relying upon the arrest warrant to vitiate petitioner's appeal when, in fact, the Government mislead petitioner into believing that there was no warrant or if there was a warrant, it was not going to be relied upon.

CONCLUSION

Petitioner respectfully submits that this case be remanded to the District Court for determination of whether or not the arrest warrant was based upon the requisite probable cause and whether or not the agents arrested petitioner pursuant to that warrant or in the alternative, this Court issue an order holding that under

the facts and circumstances of this case, the District Court erred in ordering the record to be enlarged for the reason that the Government had never used or relied on the arrest warrant at any point in the case.

DATED this 10th day of January, 1975.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NITED STATES OF AMERICA,
Appellee,

v.

OBERT LOUIS RICHARDSON,
Appellant.

FILED
DEC 4 1974
CLERK U.S. COURT OF APPEALS (STAMP)
No. 74-1985

ORDER

Appeal from the United States District Court for the District of Arizona

EFORE: BARNES and CARTER, Circuit Judges and NDBERG, District Judge*

In response to appellant's petition for rehearing alled a petition for review) filed on November 14, 974, and in order to correct an inaccuracy contained the court's memorandum filed on November 5, 1974, e court withdraws its prior memorandum and files in stead the attached revised memorandum.

Upon filing of the revised memorandum, the petition r rehearing is denied.

*Hon. William J. Lindberg, Senior United States District idge, Western District of Washington, sitting by designation.

APPENDIX B

[Caption omitted in printing]

MEMORANDUM

Appeal from the United States
District Court for the District
of Arizona

BEFORE: BARNES and CARTER, Circuit Judges and LINDBERG, District Judge*

This is an appeal from the judgment of conviction for possession of marijuana (1652 pounds) with intent to distribute under 21 U.S.C. §841(a) (1) (1970). We affirm.

On January 16, 1974, the defendant moved to suppress evidence. A hearing was held on February 4, 1974, and the following day the motion to suppress was denied. After a trial to the court and a finding of guilt, a judgment of conviction was entered on April 1, 1974. A notice of appeal was filed and the record on appeal was designated. On July 22, 1974, the prosecution moved to enlarge the record on appeal to include both a warrant for the arrest of the defendant and a complaint in support thereof. Although the

*Hon. William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

defendant opposed enlargement of the record, the motion was granted on August 2, 1974. The arrest warrant and complaint were then transmitted to us.

On October 30, 1973, a magistrate for the District of Arizona issued a warrant for the arrest of the defendant and a warrant authorizing a search of the defendant's home. On the same day agents for the drug enforcement administration went to the defendant's home and found the defendant standing in his front yard. When the defendant identified himself, one of the agents informed him that the agency had procured a warrant for his arrest. The defendant was then told that he was under arrest and was advised of his constitutional rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The arrest warrant was not shown to the defendant. A different agent proceeded to the house, knocked on the metal screen door and shouted, "federal agents with a search warrant." That agent, having received no answer to his knock, then said, "we're coming in." Thereupon the agent opened the screen door and entered the house. The house was unoccupied, but a large quantity of marijuana was found in it.

The defendant has complained that the record on appeal was improperly enlarged. The defendant has asserted that he proceeded on a theory of defense dependent on the absence of a warrant of arrest; moreover, according to the defendant, the prosecution did not rely in making its case on the arrest warrant. To permit use of the arrest warrant now is unfairly to introduce a factor into the appeal which was neither employed nor defended against in the district court. In making this assertion the defendant has ignored the fact

that the complaint in support of the warrant of arrest was placed in the court file long before the suppression hearing and trial.[1] Moreover, the warrant of arrest itself had similarly been issued, delivered to the United States Marshal, executed and returned to the clerk of the court well in advance of the suppression hearing and trial.[2] That counsel for the defendant, in perusing the file during the early stages of the case, might not have discovered an arrest warrant upon which the prosecution did not rely does not alter the fact that the warrant was most probably part of the district court

[1] The complaint bears the file stamp of the district court clerk for November 29, 1973. The clerk's criminal docket sheet contains an entry for November 29, 1973, indicating that the complaint was filed on that date. The magistrate's determination that probable cause existed for issuance of the warrant of arrest was properly founded upon the complaint. FED. R. CRIM. P. 4(a).

[2] The warrant bears, adjacent to the magistrate's signature, the typewritten date October 30, 1973. The warrant bears the received stamp of the marshals service for October 30, 1973, and the warrant was executed and returned.

The arrest warrant bears a received stamp of the district court clerk for October 31, 1973. The clerk's criminal docket sheet contains an entry for November 29, 1973, indicating that the magistrate's record of proceedings was filed on that date. At the conclusion of preliminary proceedings before him, the magistrate is required to transfer to the clerk of the court all papers in the proceedings. FED. R. CRIM. P. 5(c). In the July 22, 1974, affidavit of the assistant United States Attorney who presented the case, it was stated that the "warrant of arrest is a part of the trial court's record." Given all these indications it is reasonable to infer that the arrest warrant had been placed in the court file prior to the suppression hearing and trial. A reading of the August 2, 1974, order enlarging the record on appeal, supports the conclusion that the district court drew this inference.

record and properly before the district judge when the case was heard. The district judge has so found.

Correction of the record on appeal in order to "truly disclos[e] what occurred in the district court" is permitted by FED. R. APP. P. 10(e). Where the correction concerns an erroneous omission from the record of a thing material to either party, the district court may correct the omission after the record has been transmitted to the court of appeals. When a dispute respecting the record is submitted to the district court, its determination is conclusive, absent a showing that the district court has intentionally falsified the record. 9 J. Moore, Federal Practice ¶210.08, at 1640 (2nd ed. 1973). Under the circumstances, and particularly as the defendant has put the validity of his arrest in issue, we hold that the district court properly ordered enlargement of the record on appeal.[3]

In urging reversal of the judgment below, the defendant has offered the same points with which he supported his motion to suppress. Evidence adduced at trial should have been suppressed because: (1) the defendant had been unlawfully arrested, consequently a search subsequent to the defendant's arrest was tainted with illegality; (2) the agents of the drug enforcement

[3]More effort than the problem deserves has been given to resolving the question whether the warrant of arrest was actually placed in the court file. It remains the case that the defendant was arrested pursuant to a warrant issued upon probable cause, whether the warrant was in the file or not. The supporting complaint has been in the file and available for attack since November 29, 1973. And, most importantly, the evidence sought to be suppressed was procured pursuant to a valid search warrant, obtained without reliance upon the defendant's arrest in any way, thereby rendering substantially irrelevant any inquiry into the validity of the defendant's arrest.

administration had not complied with the notice requirements of 18 U.S.C. §3109 (1970) in entering the defendant's home.

There is nothing in the record which would support an allegation that the defendant's arrest was illegal. An arrest warrant naming the defendant was issued by the magistrate. The application for the arrest warrant had been supported by a complaint averring that the complainant had received a written statement from a reliable informant. The informant's statement revealed that the defendant, aided by the informant and others, had loaded and unloaded on the order of 1000 pounds of marijuana at the defendant's home. The statement further revealed that certain portions of the marijuana were intended by the defendant for sale out of state. Sufficient information to support an independent judgment that probable cause existed for issuance of the arrest warrant had been presented to the magistrate. The arrest warrant was thus properly issued. *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560 (1971). When the defendant was arrested, he was advised that his arrest was pursuant to a warrant. No showing has been made that an improper delay took place between issuance of the warrant and arrest, nor has our attention been directed to any other defect in the arrest process. We therefore conclude that the defendant was lawfully arrested and that no basis for exclusion of evidence lay in the arrest process.

With respect to the execution of the search warrant, the defendant has argued that the agents' authority and purpose should have been announced to the defendant personally. The pertinent statute, 18 U.S.C. §3109 (1970) provides:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

In the instant case, the agents searched defendant's home pursuant to a warrant whose validity has not been challenged. The agents made the search after the defendant had been arrested and after an agent had knocked on the door of the house, and shouted "federal agents with a search warrant" and had not been admitted. The defendant was within earshot in the front yard when the agent knocked and shouted.

We hold that the requirements of 18 U.S.C. §3109 (1970) have been met. Before entry, notice of authority and purpose had been given. The notice was sufficient to protect the residents' rights of privacy. *Sabbath v. United States*, 391 U.S. 585 (1968). Notice was given loudly, completely, and could easily have been heard by the defendant himself as well as anyone within the house. Moreover, where, as here, the defendant had been arrested and knew why he had been arrested, the formal announcement of entry and search was not required. *Wittner v. United States*, 406 F.2d 1165 (5th Cir. 1969). We therefore conclude that the search conducted of defendant's home did not violate the statute and suppression of evidence based upon the search was properly denied.

Affirmed.

APPENDIX C

[Caption omitted in printing]

FILED
NOV 5 1974
EMIL E. MELFI, JR. CLERK
U.S. COURT OF APPEALS

MEMORANDUM

Appeal from the United States
District Court for the District
of Arizona

BEFORE: BARNES and CARTER, Circuit Judges and LINDBERG, District Judge*

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On October 30, 1973, a magistrate for the District of Arizona issued a warrant for the arrest of the defendant and a warrant authorizing a search of the defendant's home. On the same day agents for the drug enforcement administration went to the defendant's home and found the defendant standing in his front yard. When the defendant identified himself, one of the agents informed him that the agency had procured a warrant for his arrest. The defendant was then told that he was under arrest and was advised of his constitutional rights in accordance with *Miranda v. Arizona*, 384 U.S. 436 (1966). The arrest warrant was not shown to the defendant. A different agent proceeded to the house, knocked on the metal screen door and shouted, "federal agents with a search warrant." That agent, having received no answer to his knock, then said, "we're coming in." Thereupon the agent opened the screen door and entered the house. The house was unoccupied, but a large quantity of marijuana was found in it.

The defendant has complained that the record on appeal was improperly enlarged. The defendant has asserted that he proceeded on a theory of defense dependent on the absence of a warrant of arrest; moreover, according to the defendant, the prosecution did not rely in making its case on the arrest warrant.

To permit use of the arrest warrant now is unfairly to introduce a factor into the appeal which was neither employed nor defended against in the district court. In making this assertion the defendant has ignored the fact that both the warrant of arrest and the complaint in support of it were placed in the court file long before the suppression hearing and trial.[1] The defendant has not showed that anything was awry with the court file other than that his perusal of the file in the early stages of the case revealed no arrest warrant. That counsel for the defendant might not have discovered an arrest warrant upon which the prosecution did not rely does not alter the fact that the warrant, and its supporting complaint, were part of the district court record and properly before the district judge when the case was heard.

Correction of the record on appeal in order to "truly disclos[e] what occurred in the district court" is permitted by FED. R. APP. P. 10(e). Where the correction concerns an erroneous ommission from the record of a thing material to either party, the district court may correct the omission after the record has been transmitted to the court of appeals. When a

[1] The complaint bears the file stamp of the district court clerk for November 29, 1973. The arrest warrant bears a received stamp of the district court clerk for October 31, 1973. The clerk's criminal docket sheet contains an entry for November 29, 1973, indicating that the complaint was filed on that date. The clerk's criminal docket sheet also contains an entry for December 21, 1973, indicating that the warrant for arrest of for Jimmy Richardson the defendant was filed on that date, after having been executed. In the July 22, 1974, affidavit of the assistant United States Attorney who prosecuted the case, it was stated that the "warrant of arrest is a part of the trial court's record."

dispute respecting the record is submitted to the district court, its determination is conclusive, absent a showing that the district court has intentionally falsified the record. 9 J. MOORE, FEDERAL PRACTICE ¶ 210.08, at 1640 (2nd ed. 1973). Under the circumstances, and particularly as the defendant has put the validity of his arrest in issue, we hold that the district court properly ordered enlargement of the record on appeal.

In urging reversal of the judgment below, the defendant has offered the same points with which he supported his motion to suppress. Evidence adduced at trial should have been suppressed because: (1) the defendant had been unlawfully arrested, consequently a search subsequent to the defendant's arrest was tainted with illegality; (2) the agents of the drug enforcement administration had not complied with the notice requirements of 18 U.S.C. §3109 (1970) in entering the defendant's home.

There is nothing in the record which would support an allegation that the defendant's arrest was illegal. An arrest warrant naming the defendant was issued by the magistrate. The application for the arrest warrant had been supported by a complaint averring that the complainant had received a written statement from a reliable informant. The informant's statement revealed that the defendant, aided by the informant and others, had loaded and unloaded on the order of 1000 pounds of marijuana at the defendant's home. The statement further revealed that certain portions of the marijuana were intended by the defendant for sale out of state. Sufficient information to support an independent judgment that probable cause existed for issuance of the arrest warrant had been presented to the magistrate.

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Affirmed.